

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Creation of Low)	MM Docket No. 99-25
Power Radio Service)	
)	
 To: The Commission		

**COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

Lynn Claudy
Senior Vice President
John G. Marino
Vice President
David H. Layer
Director, Advanced Engineering
NAB Science & Technology

Joshua Pila
Lindsay Stoudt
NAB Law Clerks

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Marsha J. MacBride
Jerianne Timmerman
Ann West Bobeck

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Executive Summary

The National Association of Broadcasters hereby comments in response to the *Second Order on Reconsideration and Further Notice of Proposed Rulemaking* addressing various Low Power FM (“LPFM”) ownership and technical issues. NAB’s comments focus on (1) the relationship between LPFM and full power FM service and (2) the relationship between LPFM and FM translators. We note that the issue of interference protection between LPFM and full power FM stations – both new and existing – is governed by statute and cannot be limited to co- and first adjacent channels, as suggested in the *Further Notice*. And reducing interference protection for subsequently-authorized full power FM service could deny thousands of listeners the benefits of FM station upgrades or new FM service, including digital radio. Thus, the Commission cannot, as a matter of law, and should not, as a matter of policy, alter its rules to limit the LPFM interference protections in Section 73.809 of its rules to co- and first adjacent full power FM stations.

In lieu of more radical proposed measures that would allow significant interference to full power FM signals, NAB proposes that the Commission should instead focus on constructive means by which an operating LPFM station displaced by new or upgraded full power FM service can be relocated *without creating harmful interference*. Such constructive measures could include granting the displaced LPFM station priority and expedited processing over other LPFM applications without the need for opening an application window. Indeed, the Commission has already granted such displacement relief in the context of low power television. In light of the very limited number of

LPFM stations that have actually been displaced (one), NAB urges the Commission to first consider this type of displacement relief.

Turning to the issue of FM translators, NAB submits that the Commission should not give LPFM stations greater regulatory status than FM translators. Further, NAB urges the Commission to lift the freeze on pending FM translator applications and appropriately process these applications. Since the Commission first authorized FM translators in 1970 as a means of providing radio service to areas and populations that were unable to receive FM signals due to distance and terrain, translators have proven to be a critical component for delivering essential news, weather, emergency information and Amber Alerts, as well as entertainment to the communities broadcasters serve.

The *Further Notice* imposed a freeze on the processing of FM translator applications pending from the 2003 filing window ostensibly because granting translator licenses might prevent the Commission from licensing LPFM stations in the future. LPFM and translators, however, are not mutually exclusive and can be viable services alongside each other. NAB recognizes that nascent LPFM service may provide niche programming, an important public service. That does not diminish the fact, however, that with the help of FM translators, local full power broadcasters also provide diverse, quality programming, reaching nearly 75% of Americans ages twelve and older every day. As the Commission has previously recognized, translators “provide an opportunity to import programming formats otherwise unavailable” in local markets. In this proceeding, the Commission should again recognize the valuable service translators provide.

Moreover, there is no demonstrated need for a change in regulatory priority status between LPFM stations and FM translators. Pending applications from the 2003 FM translator window have not impeded, in any measure, the Commission's ability to process LPFM applications under the existing rules. To the extent that parties are urging the Commission to suspend processing FM translator applications to reserve potential places for LPFM stations on channels spaced third adjacent to full power FM stations, in case Congress were to someday change the law, the Commission should reject their calls.

Finally, the Commission should refrain from taking further unwarranted actions urged by certain parties, including the extreme measures of dismissing pending FM translator applications or extending the freeze on their processing. Any such action would have a significant adverse impact on full power FM radio service with little commensurate benefit.

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I. Introduction.

¹ NAB is a nonprofit, incorporated association of radio and television stations and networks that serves and represents the American broadcasting industry.

² Second Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Docket No. 99-25, 20 FCC Rcd 6563, rel. Mar. 17, 2005 (“*Further Notice*”).

benefits of FM station upgrades or new FM service, including digital radio.³ Thus, the Commission cannot, as a matter of law, and should not, as a matter of policy, alter its rules to limit the LPFM interference protections in Section 73.809 of its rules⁴ to co- and first adjacent full power FM stations as proposed in the *Further Notice*.⁵

In lieu of more radical proposed measures that would allow significant interference to full power FM signals, NAB proposes that the Commission should instead focus on constructive means by which an operating LPFM station displaced by new or upgraded full power FM service can be relocated *without creating harmful interference*. Such constructive measures could include granting the displaced LPFM station priority and expedited processing over other LPFM applications without the need for opening an application window. Indeed, the Commission has already granted such displacement relief in the context of low power television. In light of the very limited number of LPFM stations that have actually been displaced (one), NAB urges the Commission to first consider this type of displacement relief.

Turning to the issue of FM translators, NAB submits that the Commission should not give LPFM stations greater regulatory status than FM translators. Further, NAB urges the Commission to lift the freeze on pending FM translator applications and

³ Broadcasters have also invested millions to ensure their listeners can be better served through free-over-the-air digital radio (“HD Radio”). In 2005 broadcasters spent over \$46 million in HD Radio related capital expenditures. *See JP Morgan Analyst Report* (June 16, 2005). And to date 890 high definition (“HD”) radio stations are licensed in the United States with over 465 stations on the air. *See* <http://www.ibiquity.com/> (last visited Aug. 22, 2005).

⁴ 47 C.F.R. § 73.809(a).

⁵ *Further Notice* at ¶ 39.

appropriately process these applications. Since the Commission first authorized FM translators in 1970 as a means of providing radio service to areas and populations that were unable to receive FM signals due to distance and terrain,⁶ translators have proven to be a critical component for delivering essential news, weather, emergency information and Amber Alerts, as well as entertainment to the communities broadcasters serve. Indeed, in light of these benefits, the Commission has consistently recognized translators' value to local communities: "translator-based delivery of broadcast programming in an important objective', and [the FCC] continue[s] to support this objective."⁷ Between 1997 and 2003, however, the Commission did not accept either new or major change applications for translators.⁸ Thus, it is not surprising that when the FCC opened the 2003 FM translator window,⁹ it received a large volume of applications for this valuable service.

The *Further Notice* imposed a freeze on processing of FM translator applications still pending from 2003 window ostensibly because granting translator licenses might prevent the Commission from licensing LPFM stations in the future.¹⁰ LPFM and

⁶ *Report and Order* in Docket No. 17159, 20 Rad. Reg. 2d (P&G) 1538 (1970); *see also* 47 C.F.R. § 74.1231(a).

⁷ *Further Notice* at ¶ 32 (*citing* In re Creation of a Low Power Radio Service, *Order on Reconsideration*), 15 FCC Rcd 19208, 19224 (2000) ("*LPFM Order On Reconsideration*").

⁸ In 1997, the FCC imposed a freeze on filing new and major change applications for non-reserved band translators. *Implementation of Section 309(j) of the Communications Act*, 12 FCC Rcd 22363, 22388 (1997).

⁹ *See Public Notice*, FM Translator Auction Filing Window and Application Freeze, Report No. AUC-03-83A (Auction No. 83), rel. Feb. 6, 2003.

¹⁰ *Further Notice* at ¶ 31.

translators, however, are not mutually exclusive and can be viable services alongside each other. NAB recognizes that nascent LPFM service may provide niche programming, an important public service. That does not diminish the fact, however, that with the help of FM translators, local full power broadcasters also provide diverse, quality programming, reaching nearly 75% of Americans ages twelve and older every day.¹¹ As the Commission has previously recognized, translators “provide an opportunity to import programming formats otherwise unavailable” in local markets.¹² In this proceeding, the Commission should again recognize the valuable service FM translators provide.

Moreover, there is no demonstrated need for a change in regulatory priority status between LPFM stations and FM translators. Pending applications from the 2003 FM translator window have not impeded, in any measure, the Commission’s ability to process LPFM applications under the existing rules. To the extent that parties are urging the Commission to suspend processing FM translator applications to reserve potential places for LPFM stations on channels spaced third adjacent to full power FM stations, in case Congress were to someday change the law, the Commission should reject their calls.

Finally, the Commission should refrain from taking further unwarranted actions urged by certain parties, including the extreme measures of dismissing pending FM

¹¹ RAB Radio Marketing Guide & Factbook for Advertisers, 2003-2004 Edition, found at http://www.rab.com/station/marketing_guide/RMGFB2004.pdf (last visited Aug. 22, 2005).

¹² In the Matter of Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations, *Report and Order*, 5 FCC Rcd 25 (1990) at ¶ 49 (in which the Commission also recognized the benefit translators have in disseminating emergency information) (“*1990 FM Translator Order*”).

translator applications or extending the freeze on their processing. Any such action would have a significant adverse impact on full power FM radio service with little commensurate benefit.

II. The Commission Should Not Amend Section 73.809.

The *Further Notice* requests comment on whether it is appropriate to amend Section 73.809 to permit an existing LPFM station to continue operation “even when interference is predicted to occur within the 70 dBu contour” of a subsequently-authorized full power FM station on a “second- or third-adjacent channel.” *Further Notice* at ¶ 39. On its face, this proposal would permit interference to subsequently-authorized full power FM stations sited on channels second or third adjacent to an LPFM station, including those stations providing (1) new service to a community of license or (2) a modified or upgraded class of FM service. For the reasons set forth below, NAB opposes any such revision.

A. The Commission Is Statutorily Prohibited From Relaxing Second And Third Adjacent Channel Protections.

At this time, the Commission lacks authority to amend Section 73.809. In late 2000, Congress required the FCC to maintain third adjacent channel protections for FM service and ordered the agency to conduct field tests to determine in real world conditions whether LPFM stations would interfere with existing FM stations and FM translators if LPFM stations were not subject to third adjacent channel spacing requirements.¹³ The Commission subsequently revised

¹³ District of Columbia Appropriations Act, FY 2001, Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762A-111(2000) (“*Radio Broadcast Preservation Act*” or “*RPBA*”). In early 2000, over the objections of NAB and others, the FCC had concluded that licensing LPFM stations on third adjacent channels would not result in significant interference to existing full power FM stations.

Section 73.807 of its rules to re-establish the minimum distance separations set forth by the *RPBA*.¹⁴ It did not, however, modify Section 73.809 to reflect the legislatively mandated third adjacent channel spacing requirements.¹⁵ Section 73.809(a) states:

“[i]t shall be the responsibility of the licensee of an LPFM station to correct at its expense any condition of interference to the direct reception of the signal of any subsequently authorized commercial or NCE FM station that operates on the same channel, first-adjacent channel, second-adjacent channel or intermediate frequency (IF) channels as the LPFM station, where interference is predicted to and actually occurs within the 8.16 mV/m (70 dBu) contour of such stations.”

47 C.F.R. § 73.809(a). Despite this oversight as the specific text of Section 73.809, the Commission has recognized that “[u]nder Section 73.809 ... LPFM stations are responsible for resolving all allegations of actual interference to the reception of a co-channel, or first-, second-, or *third-adjacent* channel full service station within the full service station’s 70 dBu contour.” *Further Notice* at ¶ 37 (emphasis added). NAB agrees. As discussed below, the *RPBA* requires all LPFM stations to protect full power FM service on co-, first-, second-, or third adjacent channels.

In Re Creation of Low Power Radio Service, Report and Order, MM Docket No. 99-25, 15 FCC Rcd 2205 (2000) (“*LPFM Order*”). On reconsideration, the FCC rejected claims that it had ignored record evidence demonstrating a likelihood of interference from third adjacent LPFM stations, explaining that it had “simply found that the test data supported different conclusions than those reached by” many commenters. *LPFM Order on Reconsideration* at ¶ 9.

¹⁴ See *In the Matter of Creation of a Low Power Radio Service, Second Report and Order*, MM Docket 99-25, 16 FCC Rcd 8026 (2001) at ¶ 4 (“*LPFM Second Order*”).

¹⁵ In authorizing LPFM service, the Commission added Section 73.809. See *LPFM Order* at Appendix A.

The *RBPA* is unambiguous: Section 632(a) expressly states:

The Federal Communications Commission *shall* modify the rules authorizing the operation of low-power FM stations, as proposed in MM Docket No. 99-25 to [A] *prescribe the minimum distance separation for third-adjacent channels* (as well as for co-channels and first-and *second-adjacent channels*)...

[2] The Commission may not [A] eliminate or reduce the minimum separations for third-adjacent channels required by paragraph (1)(A) ...[B] except as expressly authorized by an Act of Congress enacted after the date of this Act.¹⁶

Because Congress has explicitly stated that LPFM stations “shall” not operate on channels second and third adjacent to full power FM stations, the Commission has no discretion in this matter. As numerous courts have made clear, the word “shall” is interpreted strictly as a mandatory, nondiscretionary duty.¹⁷ Significantly, Congress in the *RBPA* made no distinction between existing and subsequently-authorized full power FM stations. For this reason, it is not within the power of the Commission to reduce interference protections. Congress’ intent with regard to maintaining adjacent channel protections for *all* FM stations is clear, and the Commission “must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-43 (1984).¹⁸ Were there any

¹⁶ Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762A-111 (2000) (emphasis added).

¹⁷ See, e.g., *Pierce v. Underwood*, 487 U.S. 552 (1988); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (noting that “shall” is the strongest language Congress could possibly use); *AT&T v. FCC*, 978 F.2d 727, 735 (1992) (in which the court held that the term shall “is the language of command”) (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)); *Association of Civilian Technicians v. Federal Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (stating that “[t]he word ‘shall’ generally indicates a command that admits no discretion on the part of the person instructed to carry out the directive.”).

¹⁸ See also *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (“courts must presume that legislature says in a statute what it means and means in a statute what it says there”).

ambiguity in the statute itself (which there is not), the legislative history demonstrates Congress' intent to preserve "existing protections," including second and third adjacent channel protections for the FM band:

Before the FCC changes existing protections, protections that are as important to radio stations, public and commercial, as they are to radio listeners across America, I think it is imperative that Congress must have the authority to review any FCC changes over existing protections.

146 Cong. Rec. H2303 (daily ed. Apr. 13, 2000) (Statement of Rep. Dingell). Moreover:

The Commission is directed to maintain the same level of protection from interference from other stations for existing stations and any new full-power stations as the Commission's rules provided for The Committee intends that this level of protection should apply at any time during the operation of an LPFM station. Thus, LPFM stations which are authorized under this section, but cause interference to new or modified facilities of a full-power station, would be required to modify their facilities or cease operations.

H.R. Rep. No. 567, 106th Cong., 2d Sess. 4 (2000) at 7-8. In sum, Congress has rejected any distinctions between existing and subsequently-authorized FM stations. Indeed, as the Commission acknowledges, "Congress has mandated the use of a distance separation methodology to protect FM stations from LPFM station interference by directing the Commission to prescribe co-, first-, second-, and third-adjacent channel minimum distance separations for LPFM stations." *Further Notice* at ¶ 34. Thus, absent Congressional action altering the clear terms of the *RPBA*, the Commission is precluded from eliminating or reducing either second or third adjacent channel distance separations. And it may not amend its rules to carve out an exception for existing LPFM stations.

B. Reducing Second And Third Adjacent Channel Protections Would Harm Full Power FM Listeners And Is Contrary To FCC Policy.

Even beyond statutory restrictions, modifying Section 73.809 to reduce adjacent channel protections would be contrary to well-established Commission policy. Affording priority to LPFM stations over any full power FM stations (even those subsequently authorized) would be contrary to the basic characteristics of a *secondary* service. The Commission has consistently concluded that “secondary operations,” such as low power television stations, “must give way to *new* operations by primary users of the spectrum.”¹⁹ The Commission carefully considered the appropriate status of LPFM when the service was established, and it cannot reverse its decision without due consideration and explanation on a full record.

Not only would granting LPFM priority status be contrary to well-established policy regarding secondary services, it is also contrary to the Commission’s goal of maintaining the integrity of the FM radio service. Here, the Commission has conceded that actual interference to new FM stations from existing LPFM stations is predicted to occur. *Further Notice* at ¶ 38. That interference, moreover, could be significant.

Pursuant to the passage of the *RPBA*, the FCC commissioned MITRE to study the effects of relaxing third adjacent channel protections.²⁰ MITRE specifically found that “[n]umerous significant degradation cases were identified at distances less than 240 meters [from the LPFM transmitter site], and especially at distances less than 100 meters

¹⁹ Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd 7418, 7461 (1998) (emphasis added).

²⁰ MITRE Corporation’s Technical Report, Experimental Measurements of the Third-Adjacent-Channel Impacts of Low-Power FM Stations, *Public Notice*, MM Docket No. 99-25, rel. July 11, 2003 (“*Mitre Report*”).

and that significant degradation could occur at *somewhat larger distances in certain unfavorable circumstances. . . .*”²¹ With due caution noting that MITRE’s interference testing was incomplete,²² the FCC-commissioned field test nevertheless demonstrates that LPFM service without third adjacent channel protection will create new and actual interference to full power FM stations. Full power FM listeners located within these distances to the LPFM transmitter will experience harmful interference. And because the *MITRE Report* did not even contemplate relaxing second adjacent channel protections (as does the FCC’s proposal here), additional listeners and full power FM stations could also be adversely affected. Adoption of the Commission’s proposal would therefore mean that subsequently-authorized full power FM radio service would receive harmful interference within its protected contours, affecting potentially thousands of listeners within well-populated or growing-populated areas.

In authorizing LPFM service, the Commission articulated an additional and sound policy for requiring distance separations, including second channel adjacent protections: “LPFM stations, with their much smaller service areas and fewer service regulations, should not prevent FM stations from modifying or upgrading their facilities, nor should they preclude opportunities for new full-service stations.” *LPFM Order* at ¶ 62. The Commission explicitly recognized that the public benefited from the licensing of full

²¹ *Mitre Report*, Vol. 1 at 5-1. Also, when MITRE tested an FM translator, it concluded that “where undesired LPFM signals were broadcast from a point within the main beam of the Owatonna translator receiver and 447 meters away, numerous cases of significant degradation were noted when the LPFM ERP was 7 dBu or more.” *Id.* at 5-2.

²² For a full discussion of the *Mitre Report* see Comments of NAB, MM Docket No. 99-25, filed Oct. 14, 2003.

power FM stations capable of serving a much wider audience. Again, on reconsideration, the Commission recognized the balance between fostering new service and “our responsibility both to maintain the integrity of existing FM service and to allow for its expansion to better serve the public.” *LPFM Order on Reconsideration* at ¶ 28. NAB agrees and urges the Commission to refrain from departing from prior Commission precedent by disfavoring full service FM as proposed in this proceeding.

C. Modification Of Section 73.809 Would Not Further The Goals Of The Communications Act.

There is no reason to believe that modification of Section 73.809 is necessary to further the Communications Act. The Commission’s present proposal appears to be based on the theory that new and upgraded full power FM service will dislocate LPFM service. To date, however, only one LPFM station has actually been displaced. *Further Notice* at ¶ 38. Thus, it seems unnecessary to adopt radical measures that would allow significant interference to full power FM signals to occur. Instead, NAB submits that a constructive means by which a displaced operating LPFM station can be relocated *without creating harmful interference* would better serve the public interest. Such constructive measures could include granting the displaced LPFM station priority and expedited processing over other LPFM applications.

In fact, the Commission has already adopted such relief for displaced low power television stations (“LPTV”), especially those displaced by the digital transition. *See* 47 C.F.R. § 73.3572(a)(4). For example, LPTV stations displaced by digital television stations can seek replacement channels in the same area without being subject to competing applications. Applications for replacement channels will be considered on a

“first come, first served” basis, without waiting for the Commission to open a low power application window. The Commission also affords applications for displacement relief priority over applications for new LPTV stations and requests for modifications of existing LPTV stations, including any such pending applications and requests.²³ Thus, there are many effective and less radical remedies for granting relief to any displaced LPFM stations. NAB urges the Commission to first explore constructive measures to afford relief to LPFM stations without creating harmful interference to full power FM stations, particularly in light of the very limited number of LPFM stations that have actually been displaced.

And while the Commission’s goal of allowing a LPFM station to “continue operating on its channel, wherever possible, as the radio environment changes around it”²⁴ is valid, the Commission must also adhere to the goals articulated in the Communications Act. Section 307(b) of the Communications Act states:

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

47 U.S.C. §307(b) (emphasis added).

Over the decades, the Commission has scrupulously adhered to Section 307(b), especially when devising its channel allocation and licensing policies. For example, in

²³ For a full discussion on this issue, *see* TV Translators and the DTV Transition found at <http://www.fcc.gov/oet/faqs/dtv-tvtx.html> (last visited Aug. 22, 2005).

²⁴ *LPFM Order* at ¶ 62 .

1982 when the Commission revised its priorities for allocating FM channels,²⁵ it concluded that Section 307(b) was best served by “assuring the availability of at least one full-time radio service *to as many people as possible*.” *Id.* at ¶ 11 (emphasis added). Moreover, in Section 307(b) proceedings when comparing the radio needs of respective communities, the Commission has expressly considered the area and population that would gain or lose service from the competing proposals and the availability of other primary service.²⁶ The Commission has also indicated that, in cases where two communities are vying for their first local transmission service, the larger community should obtain the allotment.²⁷ The Commission has consistently interpreted Section 307(b) so as to give priority to full time FM service that can reach a wide audience over a proposed service reaching a much smaller population.

Were, however, the Commission to amend Section 73.809 of its rules, the result would be a less efficient and less equitable distribution of radio services, as populations close to LPFM transmitters could be precluded from receiving any subsequently-authorized full-time FM radio service, even from first full-time aural or first local services. In the future, these populations located near LPFM transmitters could also be precluded from receiving new and innovative HD Radio service due to LPFM

²⁵ FM Channel Policies/Procedures, *Second Report and Order*, 90 FCC 2d 88, 90-93 (1982); *recon. denied*, 56 RR 2d 448 (1984). These priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service and (4) other public interest matters. Priorities two and three are co-equal.

²⁶ In the Matter of Implementation of Section 309(j) of the Communications Act, *First Report and Order*, 63 Fed. Reg. 48615 (1993) at fn. 109 (*citing Eliza Broadcasting Corporation*, 2 FCC Rcd 4468 (ALJ)).

²⁷ *Id.* at 13.

interference. Thus, even if the Commission had the statutory authority to alter Section 73.809 of its rules to eliminate second and third adjacent channel protections for subsequently-authorized FM services (which it does not), the elimination of these protections is contrary to the goals of the Communications Act and well-established Commission policy.

III. There Is No Demonstrated Need For A Change In Priority Status Between LPFM Stations And FM Translators.

The *Further Notice* requests comment on “whether, and if so, under what conditions LPFM applications should be treated as having ‘primary’ status to prior-filed FM translator applications.” *Further Notice* at ¶ 33. It also queries whether primary status should be granted because “LPFM stations are *permitted* to originate local programming,” or whether primary status should be granted “based on a pledge for LPFM licensees to originate at least eight hours of original programming.” *Id.* As discussed below, the balance between these two secondary services is appropriate. There is no basis for any presumption that LPFM stations better serve their communities and therefore are entitled to greater status over any class of FM translators. Rather, affording greater regulatory status to LPFM stations will greatly harm full power FM radio service, particularly for those stations that rely on a series of translators to deliver programming. Similarly, there is no basis for an assumption that, under the current rules, LPFM licensing has been, by any measure, impeded by the 2003 FM translator applications.

**A. The Commission Has Already Struck An Appropriate Balance
Between FM Translators And LPFM Stations.**

The Commission's rules state that both FM translators and LPFM stations have a secondary status to existing full power stations.²⁸ There are, however, differences as to how FM translators and LPFM stations protect full power FM stations. For example, translators licensed before June 1, 1991 that would cause predicted interference are not required to cease operation unless actual interference is found.²⁹ FM translators also have an exception so that if the licensee can demonstrate any overlap in protected contours covers unpopulated areas or "white areas," the translator is permitted to continue operating.³⁰ Yet FM translators are required to protect a "regularly used" full service signal, which may extend beyond a full power FM station's protected contour.³¹

Conversely, LPFM stations are only required to protect full-service stations if interference is within the full service station's 70 dBu principal community contour and not beyond it.³² And whereas a translator must go dark if it interferes with a subsequent modification of a full power station,³³ an LPFM station is allowed to remain on the air as

²⁸ See *LPFM Order* at ¶ 61. See also 47 C.F.R. §§ 73.809 and 74.1203.

²⁹ See 47 C.F.R. § 74.1204(j).

³⁰ *1990 FM Translator Order* at ¶ 128; In Re Application of Living Way Ministries, Inc., for a Construction Permit for a New Noncommercial Educational FM Translator Station on Channel 220 at Sun Valley, California, *Memorandum Opinion and Order*, 17 FCC Rcd 17054 (2002).

³¹ *Id.*; FM Translator Stations, *Memorandum Opinion and Order*, MM Docket No. 88-140 (1993) at ¶ 41.

³² *LPFM Order on Reconsideration* at ¶ 30.

³³ *1990 FM Translator Order* at ¶ 130.

long as it is not interfering with the full-service station's community of license and merely accepts interference from the full power station.³⁴

The Commission has stated “we do not feel it is necessary for both services to have identical interference protection requirements,” and has concluded that its “rules place LPFM stations and FM translators on essentially equal footing in providing reciprocal interference protection.”³⁵ NAB agrees. Although the Commission has previously solicited comment on the relationship between translators and LPFM,³⁶ it has thus far declined to grant priority status to one service over the other.³⁷ The rules currently provide that both translator and LPFM applications are required to protect translator and LPFM authorizations and prior-filed translator and LPFM applications.³⁸ The current rules also comport with the Commission's long-standing practice across various services of “first come, first served” application processing.³⁹ In fact, the

³⁴ *LPFM Order* at ¶ 66.

³⁵ *LPFM Order on Reconsideration* at ¶¶ 30, 39.

³⁶ In the Matter of Creation of Low Power Radio Service, *Notice of Proposed Rulemaking*, MM Docket No. 99-25, 14 FCC Rcd 2471, ¶ 33 (1999) (hereinafter “*LPFM NPRM*”); In the Matter of Broadcast Localism, *Notice of Inquiry*, MM Docket No. 04-233, 19 FCC Rcd 12425 (2004) at ¶ 45 (“*Localism NOI*”).

³⁷ *LPFM Report and Order* at ¶ 62; *LPFM Order on Reconsideration* at ¶ 30.

³⁸ *Id.*

³⁹ In 1985, the Commission moved from a “cutoff date” policy to the application of a filing window and subsequent “first-come, first-serve” process. *See Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985). The Commission subsequently extended “first come, first serve” processing to improve the efficiency of processing minor change broadcast applications. *See In the Matter of 1998 Biennial Regulatory Review, First Report and Order*, MM Docket No. 98-93, 14 FCC Rcd 5272 (1999). First come, first served” was recently reaffirmed in the satellite context. *See 2000 Biennial Regulatory Review for Streamlining and Other Revisions of Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum*

Commission declined to depart from “first come, first serve” in the LPTV and TV translator context, concluding “that the public interest will be served by the processing of all applications and not choosing one group of applicants to favor over another.”⁴⁰

In accordance with well-established “first come, first served” procedures, FM translator applications filed pursuant to the 2003 window must protect LPFM applications filed pursuant to the 2000-2001 windows. NAB submits that this is a reasonable and appropriate balance between the two secondary services and without a specific public interest reason for altering the relationship, the Commission should not change it.

B. Full Power FM Broadcasters Provide Community-Responsive Programming And Thus “Enhance Localism.”

If the Commission alters this balance, it must provide a reasoned analysis for doing so. Although NAB recognizes that “[r]egulatory agencies do not establish rules . . . to last forever,”⁴¹ the courts have required “an agency changing its course . . . to supply a reasoned analysis for the change beyond that which may required when an agency does not act in the first instance.”⁴²

Usage by, Satellite Network, 17 FCC Rcd 3847 (2002) (adopting first-come, first-serve process without a filing window because of a lack of a satellite Table of Allotments).

⁴⁰ In the Matter of Low Power Television And Television Translator Service, *Report and Order*, MM Docket No. 83-1350, 102 FCC 2d 295, 303 (1984).

⁴¹ *American Trucking Association v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967).

⁴² *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983). *See also ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) (court found that the FCC had failed to establish “the requisite ‘reasoned basis’ for altering its long-established policy” on certain television commercial limits).

The Commission has posited that a change in status between FM translators and LPFM applications may be warranted because such a measure could “enhance localism.” *Further Notice* at ¶ 33.⁴³ There is no specific evidence, however, that granting priority status to LPFM applications over FM translators will, in any measure, enhance localism or better serve communities. It is axiomatic that any Commission policy must be supported by a sufficient factual record.⁴⁴ And while it may be true that many LPFM stations provide good service to their communities, as noted above, FM translators also bring important information to underserved areas. The available evidence from the Commission’s localism proceeding provides useful information. In that proceeding, parties representing at least 2254 radio licensees submitted information on the amount and variety of locally-relevant programming they deliver, the valuable coverage that broadcasters devote to politics and civic discourse, as well as their efforts to ascertain the needs and interests of their local communities broadcasters.⁴⁵ This broad array of programming meeting the needs of communities, when carried over FM translators, also “enhances localism” for rural and terrain-challenged communities.

1. Full Power FM Broadcasters Provide An Array Of Community-Responsive Programming And Services.

Different radio stations may determine the needs and interests of their local audiences in different ways, depending on their resources and market size. Large

⁴³ See also *Localism NOI*, 19 FCC Rcd at 12442.

⁴⁴ See, e.g., *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 763 (6th Cir. 1995) (court rejected restrictions on cellular providers’ participation in certain auctions as arbitrary because Commission failed to factually support the rules).

⁴⁵ See *In the Matter of Broadcast Localism, Reply Comments of NAB*, MM Docket No. 04-233 (Jan. 3, 2005).

stations may have the funds to conduct sophisticated market surveys and in-house audience tests. Mid-sized and independent stations may rely on simpler methods, such as regular meetings with community leaders and interested audience members, employee participation in community activities, and letters and emails from the public. And the licensees of stations in small markets may ascertain local attitudes by reading the local newspaper and talking to neighbors at the local coffee shop. The overriding point is that, regardless of their size, market or resources, all radio stations must study and react to the needs and interests of their local communities as a matter of survival in a competitive marketplace.⁴⁶ As described in detail in NAB's comments and reply comments in the pending localism proceeding, radio stations (often using translators) today provide a broad mix of entertainment and informational programming to listeners in local communities throughout the country.⁴⁷

Beyond providing a wide array of programming, full power radio broadcasters are committed to serving their local communities in other tangible ways. In 2003, the average radio station aired 195 Public Service Announcements ("PSAs"), a combined value of over \$5.6 billion in donated airtime, and 65% of these PSAs pertained to local

⁴⁶ As the Commission recognized nearly a quarter century ago, radio stations present programming that serves "the wants and needs of the public," including news and other informational programming, in "response to market forces." *Deregulation of Radio, Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 978, 1023 (1981) ("*Radio Deregulation Order*"). In fact, the Commission determined that "marketplace and competitive forces are *more likely* to [result in community-responsive programming] than are regulatory guidelines and procedures." *Id.* at 1023 (emphasis added).

⁴⁷ See In the Matter of Broadcast Localism, *Comments of NAB*, MM Docket No. 04-233 (Nov. 1, 2004) at 12-19; In the Matter of Broadcast Localism, *Reply Comments of NAB*, MM Docket No. 04-233 (Jan. 3, 2005) at 2-25.

community issues.⁴⁸ Among radio stations that raise funds for charities, charitable causes and needy individuals, the average raised per station was \$94,480, totaling over \$955 million.⁴⁹

Moreover, broadcasters' support of community organizations is unique. When a radio station partners with a charitable or community organization, the station not only provides dollars (like other corporate partners), but also a public voice for those organizations. A broadcaster can help organizations present themselves directly to local citizens, to raise their public profile in a unique way, and to cement their connections within local communities, thereby "enhancing localism." A broadcaster can help community and non-profit organizations better leverage their fund raising resources and expertise, their public awareness and their educational efforts.⁵⁰ As one broadcaster stated at the Commission's localism hearing in San Antonio:

Both of our stations also work closely with many different private and public organizations in the area, but, like most broadcasters, we do much more than just cut checks to worthwhile causes. In fact, the most important contributions that broadcasters can make to their community has very little to do with money. We

⁴⁸ See *National Report on Local Broadcasters' Community Service*, found at <http://www.broadcastpublicservice.org/Reports/2004Report.pdf>. And these figures do not include a wide variety of off-air community service of broadcasters (such as time value of station personnel's participation in community events) or the investments that stations make in producing PSAs, radiothons and telethons, the production costs of news and public affairs programming, or the value of airtime donated for coverage of breaking emergencies. *Id.* at 2 and 5.

⁴⁹ *Id.* at 7.

⁵⁰ In this light, NAB strongly disagrees with those who dismiss a broadcaster's involvement with a local charity or organization as no more valuable than the contributions of other types of corporations. See, e.g., Harry A. Jessell, *Stations' Good Deeds Worth \$9.6 Billion*, *Broadcasting & Cable* (June 14, 2004) (quoting Andrew Schwartzman of the Media Access Project: "It's no different than what Giant supermarket does in conjunction with Toys for Tots").

raise the level of awareness, discussion, and education in our communities. *And we give a voice to local organizations, groups and individual citizens.*⁵¹

Broadcasters are also directly involved in their local communities' efforts relating to abducted children and emergency preparedness. AMBER Plan is a voluntary partnership between law-enforcement agencies and broadcasters to activate an urgent bulletin in the most serious child-abduction cases. Today there are 99 local, regional and statewide AMBER Plans across the nation. Since the program began in 1997 in the Dallas, Texas area, the AMBER Plan has been credited with successfully returning 213 children.⁵² NAB has also partnered with the U.S. Department of Homeland Security to enlist America's local radio and television stations in a campaign to ensure that people in their communities take the necessary steps to prepare for natural disasters, terrorist attacks, and other threats.⁵³ These are just a sample of the numerous, on-going efforts that all broadcasters make to produce and deliver informational, community-responsive programming and other services that meet the needs and interests of their local audiences. Full power FM broadcasters, by the very terms of their licenses, "enhance localism." And FM translators are an integral part to delivering this community-responsive programming, including emergency information.

⁵¹ Statement of Jerry T. Hanszen, Owner and General Manager, KGAS (Carthage, TX) and KMHT (Marshall, TX) (Jan. 28, 2004, San Antonio, TX) (emphasis added).

⁵² <http://www.ncmec.org/missingkids> (last visited Aug. 22, 2005).

⁵³ See *Are You Ready? A Step-by-Step Emergency Preparedness Guidebook to Prepare Your Local Community*, found at <http://www.nab.org/publicservice/Ready.asp>.

2. FM Translators Are Critical For The Delivery Of Community-Responsive Programming.

In rural and terrain-challenged areas, fill-in translators are crucial for delivering community-responsive programming to listeners.⁵⁴ High mountainous terrain, particularly in the West, blocks radio signals more readily within the 60mV contour. Moreover, short-spacing rules prohibit the grant of additional FM allotments in mountainous areas. Thus, without fill-in FM translators, many small towns would not receive any broadcast signals at all. For example:

- The towns of Pocatello and Chubbuck, Idaho (population over 60,000 persons including the University of Idaho) are serviced by two translators that fill-in signals from KLCE-FM and KCVI-FM, blocked by mountain ranges in Idaho Falls.
- The KRTY FM translator is aimed at Scotts Valley, California, a population of over 11,200 persons, and is the only FM station that broadcasts regular reports of traffic problems on the very troublesome route known as Highway 17, which crosses the Santa Cruz Mountains from San Jose. The FM translator allows KRTY to be audible throughout the entire length of Highway 17. It is also the only country music station that serves the Scotts Valley area.
- Yellowstone Public Radio's system of four stations and 28 translators bring National Public Radio significant locally produced programming to a large, sparsely-populated region of Montana and northern Wyoming. The locally produced programming includes a full-time journalist who provided daily and weekly coverage at the 2005 Montana Legislature (including "live" interactive programs involving legislators and listeners).
- Terrain shielding prevents Salt Lake City FM stations from providing reliable service to residents of Park City, Utah, which lies within the stations' protected contours. Many Park City residents commute to Salt Lake City daily and road condition reports from the major Salt Lake City stations, especially in the winter, are critical information.

⁵⁴ See, e.g., Letter From Larry Roberts, President, Fisher Radio Regional Group, Inc. to Marlene H. Dortch, Secretary, FCC, MM Docket No. 99-25, June 28, 2005.

Translator use, however, is not limited to the West. For example, WTOP relies on a translator sited in Leesburg to service the Washington suburban community. The FM translator is necessary because after sundown, WTOP's AM station is configured to protect Detroit and Minneapolis from skywave propagation. Without the Leesburg translator, tens of thousands of WTOP listeners could not rely on the station's all-news format for continuous reporting of weather, traffic, emergency, and other relevant information.

Many translators are also owned by local municipalities, which select the FM stations that best serve their communities. This use of FM translators by municipalities is inherently local. For example, numerous communities in rural Utah are served by FM translators owned by counties or other local entities. At the request of their residents, a number of municipalities have brought in FM service from the state capital of Salt Lake City.

In addition to the valuable services fill-in translators provide, FM translator stations also provide community-responsive programming on a regional level. For example, as thousands of listeners of K-LOVE articulated in their comments in Commission's recent localism inquiry, "national and regional programs [do] serve each community."⁵⁵ Educational Media Foundation, which distributes K-LOVE along with a second distinctive non-commercial format, Air 1, reaches over 10,000,000 persons via

⁵⁵ In re: Localism, Comments of Teri Webster, MB Docket No. 04-233 (Oct. 25, 2004); *see also* Comments of James Dean Cory, Ronica Coffee, et al. (Oct. 25, 2004) (opposing new LPFM stations to "take priority over current FM translator service" and potentially disrupting distribution of K-LOVE radio); Comments of Brian S. McPike ("Simply replacing K-LOVE with an LPFM would be a loss for our community").

their translator network. Without FM translators, communities such as Eureka, CA, Cobury, OR, and Phoenix, AZ would not receive these signals due to terrain obstruction. And as the Commission has recognized, translators “provide an opportunity to import programming formats otherwise unavailable” in local communities.⁵⁶ Thus, FM translators are a lifeline for delivering free-over-the-air broadcast signals to many communities that might not otherwise receive FM broadcast service.

3. Radio Programming Need Not Be Originated Locally In Order To Best Serve Its Community.

The Commission’s query as to whether “all LPFM applications [should] have primary status because LPFM stations are *permitted* to originate local programming,”⁵⁷ is inherently discriminatory because FM translators are prohibited from originating local programming.⁵⁸ It is also wrong in its underlying assumption and directly contradicted by established FCC policy. Programming need not be locally produced to be highly relevant to a broadcaster’s local community. The Commission itself has long held that programming does not have to be originated locally to qualify as “issue-responsive” for purposes of a licensee’s public service obligations.⁵⁹ When originally adopting its requirement for stations to create and maintain a quarterly Issues/Programs List, the

⁵⁶ *1990 FM Translator Order* at ¶ 49.

⁵⁷ *Further Notice* at ¶ 33.

⁵⁸ See 47 C.F.R. § 74.1231(g) (originating programming is limited to (1) emergency warning of imminent danger; and (2) spots seeking or acknowledging financial support, which are limited to a total of 30 seconds per hour).

⁵⁹ *Localism NOI* at 12431 (*citing* Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, *Memorandum Opinion and Order*, 104 FCC 2d 357, 366 (1986)).

Commission specifically noted that the use of non-locally-produced programming is “not precluded” in addressing issues of importance to the local community.⁶⁰ The D.C. Circuit endorsed this view when it decided, over the specific objections of several parties, that Section 307(b) requires only “that the Commission act to ensure a fair, efficient, and equitable distribution of radio service throughout the country,”⁶¹ and that “as long as the Commission requires licensees to provide programming – *whatever its source* – that is responsive to their communities, § 307(b) is satisfied.”⁶² In sum, the “premise that local needs can only be met through local programming produced by a local station has not only been rejected” in numerous FCC decisions, the Commission has unequivocally declared that “it lacks presumptive validity.”⁶³

It is also realistic and appropriate to treat programming as locally relevant, even though it may be produced elsewhere. News and public affairs programming of importance to the entire nation also can be important to the citizens of a particular community. For example, one cannot contend that programming concerning terrorism or the war in Iraq is unimportant to local communities. It is also not critical to a local

⁶⁰ *Radio Deregulation Order*, 84 FCC Rcd at 999.

⁶¹ *Office of Communications of the United Church of Christ v. FCC, et al.*, 707 F.2d 1413, 1430 n.54 (D.C. Cir. 1983) citing *Loyola University v. FCC*, 670 F.2d 1222, 1226 (D.C. Cir. 1982).

⁶² *Id.* at 1430 n.54 (citing 47 U.S.C. § 307(b)) (emphasis added).

⁶³ *In re Application of WPIX, Inc. For Renewal of License*, 68 FCC 2d 381, 402-03 (1978). Prior FCC precedent cited in this decision included: *In re Application of WHEC, Inc. For Renewal of License*, 52 FCC 2d 1079, 1085 (1978) (in which the FCC rejected allegation that network programming is unresponsive to local community needs, stating that the “key is responsiveness to those needs and not necessarily the original source of the broadcast matter”) and *In re Application of Westinghouse Broadcasting, Inc. For Renewal of License*, 48 FCC Rcd 1123, 1131 (1974) (in which the FCC rejected arguments that “minority needs can only be served by locally produced programming.”).

station's audience where PSA campaigns about issues such as drinking and driving, children's smoking, and drug abuse are produced; the messages can still hit home. Similarly, broadcast programming about federal officials produced outside the community are certainly relevant to local communities. As mentioned at the Commission's localism hearing in Rapid City, a station "should get credit for programming produced somewhere else, especially if the subject is really local, like interviewing our Congressman in Washington or carrying an away sports game back to the home team audience."⁶⁴ Given the vital role of FM translators in delivering all these and additional types of community-responsive programming to its listeners, NAB submits that it would be arbitrary and capricious for the Commission to establish rules favoring LPFM stations over FM translators based on a premise that is neither consistent with reality or agency policy.

C. Granting Primary Status To LPFM Stations Will Greatly Harm Full Power FM Radio Service, Particularly For Series Translators.

Allowing LPFM stations primary status over existing translators could greatly harm existing service to areas that may otherwise be unserved. In particular, should an LPFM station be allowed to displace one translator that operates as one station in a series, as is the case with many public radio networks and western areas, the entire series can be wiped out in one swoop. Existing stations must rely on translators, including

⁶⁴ Statement of Eleanor St. John, Owner and General Manager of KQEG-CA in LaCrescent, MN (May 26, 2004, Rapid City, SD).

series of translators, in rocky terrains and sparsely populated areas, to serve not only their communities, but underserved populations.

Individuals in these areas depend on these translators and should not be deprived of service either by an LPFM station being allocated to that same frequency or by a translator being knocked out at the beginning of a chain, resulting in no service down the line. As the Commission has recognized, “the rules permit translators to rebroadcast any programming broadcast by a primary FM station, thereby affording translators an opportunity to import programming formats otherwise unavailable.”⁶⁵ Thus, *at a minimum*, existing translators (including construction permit authorizations) must be protected to ensure that vital service is not interfered with, interrupted or eliminated. This would be wholly consistent with Commission precedent recognizing that “the public has a legitimate expectation that existing service will continue.”⁶⁶

IV. The FCC Should Lift The 2003 Translator Window Application Freeze.

The Commission states:

“[b]ecause LPFM and FM translator stations are licensed under fundamentally different technical rules, it is *impossible to determine the precise extent* to which the 2003 window-filed FM translator applications have impacted the potential

⁶⁵ In the Matter of Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations, *Memorandum Opinion and Order*, 8 FCC Rcd 16 (1993) at ¶ 28; *see also* 1990 FM Translator Order at ¶ 49.

⁶⁶ In the Matter of Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify A New Community of License, *Memorandum Opinion and Order*, 5 FCC Rcd 24 (1993) at ¶ 19. The FCC went onto state that “the potential for future service at some unspecified future date is a poor substitute for the signal of an operating station that can accessed today by simply turning on ...a radio set.” *Id.* *See also In re Application of Huron Shores Broadcasting Corp.*, 53 FCC 2d 216, 217 (1975) (in which the FCC stated it would disfavor modifications to a broadcast station facility where the population presently served would lose service).

licensing of new LPFM stations ...*Nonetheless we are confident that these filings have had a significant preclusive impact* on future LPFM licensing opportunities based solely on application volume.

Further Notice at ¶ 31 (emphasis added, footnotes omitted). As a threshold matter, it is inappropriate to base policy decisions on mere speculation. Rather, the agency must undertake the necessary engineering analysis to determine to what extent the FM translator window would preclude future LPFM licensing opportunities. As the D.C. Circuit has previously held, in the absence of such empirical evidence and proper analysis, the Commission's actions may be deemed "arbitrary and capricious."⁶⁷ Moreover, "broadly stated findings" and "generalized conclusions" are insufficient to uphold regulation – rather, the Commission must demonstrate on the record some "factual support for its conclusions."⁶⁸ Thus, the Commission must demonstrate on record in this proceeding how the current licensing processes for FM translators and LPFM stations are, in any measure, impeding LPFM licensing opportunities under the current rules.

As the Commission recognizes, the Mass Media Bureau opened the multi-part

⁶⁷ See *MCI Telecommunications v. FCC*, 842 F.2d 1296, 1303-04 (D.C. Cir. 1988) (in which the D.C. Circuit found that FCC lacked "sufficient evidence" upon which it could determine whether telephone tariff practices were discriminatory. Specifically, the Court noted that "In reaching the conclusion without looking to see how charges are actually calculated," the FCC "fully deserve[d] the label 'arbitrary and capricious.')" The D.C. Circuit also noted that, as in the instant proceeding, the FCC did not even request the data necessary to make a comparison. *Id.* at 1305.

⁶⁸ *Cincinnati Bell Telephone Company v. FCC*, 69 F.3d 752, 763-64 (6th Cir. 1995); see also *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (a reviewing court must set aside agency action where agency fails to provide a reasoned explanation for its conclusions); see also *Alltel Corporation v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) (in which the court determined that "[a]n argument that relies on a chain of assumptions ... cannot substitute for reasoning that is lacking in the FCC's orders.").

LPFM filing windows in 2000-01,⁶⁹ *over two years* before opening the 2003 FM translator window. According to the FCC's database, prior to the 2003 translator window, over 3000 LPFM applications were processed, with more than 75 LPFM licenses granted and an additional 15 construction permits granted.⁷⁰ After the 2003 translator window, the Commission continued to process pending LPFM applications, granting over 420 licenses and 403 construction permits.⁷¹ There are approximately 259 LPFM applications still pending at the Commission.⁷² And because the 2003 translator applications were required to protect prior-applied LPFM applications,⁷³ any translators authorized pursuant to the lifting of the translator freeze will have no preclusive effect on these remaining LPFM applications.

Nor has the Commission declared its intent to open another LPFM filing window in the near future. Rather, the Commission adopted the translator freeze in response to Prometheus' Emergency Petition.⁷⁴ Yet contrary to the assertions raised by Prometheus and discussed in detail by the Commission, allocations in the 2003 translator window

⁶⁹ See *FCC Announces Five-Stage National Filing Window for Low Power FM Broadcast Station Applications*, DA 00-621 (rel. Mar. 17, 2000); *Low Power FM Filing Window*, DA 00-914 (rel. Apr. 28, 2000); *Low Power FM Filing Window*, DC 01-904 (rel. Apr. 10, 2001).

⁷⁰ <http://www.fcc.gov/mb/audio/fmq.html> (last visited Aug. 22, 2005).

⁷¹ As of March 17, 2005, more than 590 LPFM stations are on air, with over 1,175 construction permits granted. *Further Notice* at ¶ 7.

⁷² *Id.*

⁷³ 47 C.F.R. § 74.1204 (See note to Paragraph (a)(4) - Protection of FM broadcast, FM Translator, and LP100 stations).

⁷⁴ Prometheus Radio Project, et al., *Emergency Petition for Freeze of Pending FM Translator Applications*, MM Docket No. 99-25, March 9, 2005.

were not “initially intended for LPFM.”⁷⁵ Because LPFM and FM translators stations are “licensed under fundamentally different technical rules,”⁷⁶ NAB agrees with the Commission that licenses awarded pursuant to the 2003 translator window did not “take the place” of a potential LPFM station.⁷⁷ To the extent, however, that the Commission is concerned about “future LPFM licensing opportunities,”⁷⁸ NAB urges the Commission to refrain from basing any decisions upon speculation that, if Congress someday modified the FM channel spacing rules, there would be remaining inadequate allocation for LPFM stations on third adjacent channels.

Indeed, the Commission has previously declined to alter broadcast allocations based upon speculation as to future events. Specifically, the Commission has stated that it “does not entertain speculative arguments with respect to requests to amend the Table of Allotments.”⁷⁹ The Commission has also declined to issue forfeitures “based on speculation.”⁸⁰ Nor will the Commission even entertain requests for extension of time

⁷⁵ *Id.* at 3.

⁷⁶ *Further Notice* at ¶ 31. *See also* 47 C.F.R. § 74.1203(a).

⁷⁷ *Further Notice* at ¶ 31, fn. 125 (in which the Commission states “we reject Prometheus’s characterization of the timing of these windows”).

⁷⁸ *Id.* at ¶ 31.

⁷⁹ Ridgecrest, California, *Memorandum Opinion and Order*, 10 FCC Rcd 6107 (1995) at ¶ 5 (*citing Wickenburg, Arizona*, 10 FCC Rcd 1576 (1995)). *See also* Sherman, Illinois, 17 FCC Rcd 5328 (2002) at ¶ 9 (in which the Commission declined to make an allotment “determination based on speculation” as to whether future U.S. Census data would redefine the Springfield, Illinois area).

⁸⁰ *In re Rainbow Broadcasting*, 14 FCC Rcd 11099 (1999) at ¶ 8.

“based on speculation as to events that may or may not affect” a proceeding.⁸¹ And, in the context of LPFM, the Commission has already declined to modify interference protections for full power FM broadcasters based upon a “speculative warehousing contention,” noting that a freeze on full power FM applications “would result in significant hardships to many stations without any countervailing benefits.”⁸² Here too, the Commission must limit its analysis to present-day regulations, rather than speculation about future possible congressional action. Absent empirical evidence that future LPFM licenses operating under the existing minimum distance separation rules will be precluded by the 2003 FM translator applications, the Commission must lift the freeze on translator applications.

Finally, applicants that properly filed within the window should not have their applications dismissed based upon speculation of a hypothetical harm to future LPFM licensing. The result would be fundamentally unfair to the thousands of applicants and the communities they seek to serve, who waited years for an FM translator window to open, and, after a multi-year delay, properly filed their applications in Auction 83.⁸³

⁸¹ In re Review of Commission’s Regulations Governing Television Broadcasting, 11 FCC Rcd 1046 (1995) at ¶ 3.

⁸² *LPFM Order on Reconsideration* at ¶ 34.

⁸³ Moreover, the time for Petitions to Deny many applications on Public Notice AUC-08-83-B has long expired. For example, petitions to deny the singleton applications were due within 15 days of the release of the Public Notice accepting the applications for filing. *See* In re: Creation of a Low Power Radio Service and Translator Auction, *Emergency Motion to Dismiss*, Edgewater Broadcasting, Inc., et al., MM Docket No. 99-25, March 14, 2005.

V. Conclusion.

For the foregoing reasons, the Commission is statutorily prohibited from altering the FM distance separation requirements set forth by Congress in 2000; thus, it may not eliminate second or third adjacent channel interference protection requirements for existing LPFM stations. The Commission also should not alter the regulatory priority status between LPFM stations and FM translators, because it has not demonstrated that LPFM stations “enhance localism” more effectively, and therefore, as a matter of policy, are entitled to primary status. Rather, granting primary status to LPFM stations over FM translators could lead to serious disruption of full power FM service, particularly to populations that rely on a relay of FM translators to receive their FM programming.

Finally, the Commission should refrain from taking further action, including dismissing the properly-filed pending FM translator applications or extending the freeze on their processing. Pending applications from the 2003 FM translator window have not impeded, in any measure, the Commission’s ability to process LPFM applications under

the existing rules. Such action will have a significant adverse impact on full power FM radio service with little commensurate benefit.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Lynn Claudy
Senior Vice President
John G. Marino
Vice President
David H. Layer
Director, Advanced Engineering
NAB Science & Technology

A handwritten signature in black ink, appearing to read "Marsha J. MacBride". The signature is stylized with a large, looped initial "M" and a long horizontal stroke extending to the right.

Marsha J. MacBride
Jerianne Timmerman
Ann West Bobeck

Joshua Pila
Lindsay Stoudt
NAB Law Clerks

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